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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-738

THE MESCALERO APACHE TRIBE,

Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,

Respondents.

BRIEF FOR AGUA CALIENTE BAND OF MISSION INDIANS AS AMICUS CURIAE

On April 24, 1972, the following order was made in the above-entitled case.

> "The motion of Agua Caliente Band of Mission Indians for leave to file a brief, as *amicus curiae*, is granted."

The Agua Caliente Band of Mission Indians is a duly recognized American Indian Tribe functioning under their own Constitution and By-laws with the approval of the Secretary of the Interior. Their reser-

vation is located within the geographical boundaries of the State of California. Significant economic development took place on some of their reservation lands after 1955 when Congress for the first time authorized the long term leasing thereof. Thus, through the vehicle of long term leasing the Agua Caliente Indians initiated a program of economic development, but as soon as they realized some income therefrom, they encountered a jurisdictional dispute with the County of Riverside who, under California's possessory interest law, decided to tax lessees of Indian trust lands.

The adverse effect of such a tax made the Agua Caliente Indians acutely aware of what Chief Justice John Marshall meant when he said, "The power to tax is the power to destroy". In addition, they have also become aware of the national pattern presently pursued by local governments to interfere with tribal self-government by imposing various types of taxes that tend to destroy the Indians' economic development programs. With this in mind, the Agua Caliente Indians feel that their contribution in the form of Amicus Curiae might assist this Honorable Court in its determination of a critical legal issue involving Indian Tribes throughout the country.

WHEREFORE, it is respectfully prayed that the amicus brief filed herewith by the Agua Caliente Indians be acted upon by this Honorable Court in a manner compatible with the wishes of the Mescalero Apache Tribe.

RAYMOND C. SIMPSON

Raymond C. S.

INTEREST OF AMICUS CURIAE

The Agua Caliente Band of Mission Indians is a duly recognized tribe of American Indians whose reservation is located in the State of California. The lands comprising their reservation are valuable from an appraisal point of view but since they can't eat dirt, it must be deemed virtually valueless until they are first economically developed. Toward this end the Indians have made a diligent effort to implement the long term leasing program authorized by Congress in 1955.

After the passage of more than sixteen years, these efforts have led to realized income from only five percent of their reservation lands. This is due in no small part to the fact that they were seriously frustrated and definitely deterred in 1961 when the County of Riverside decided to depart from their historical "hands off" policy respecting Indian trust lands and imposed a possessory interest tax upon the lessees of their Indian trust lands. The tribe regarded this as an unwarranted and illegal assertion of jurisdiction. Hence, when Respondents undertake to circumvent the sovereignty of the Mescalero Apache Tribe by imposing taxes on a tribal entity, they thereby create a roadblock for the economic development of the Tribe, and as an American Indian Tribe attempting to achieve economic development of its reservation lands, the Agua Caliente Indians therefore have a truly vital interest in the outcome of this case.

QUESTIONS PRESENTED

The questions presented by the case at bar are:

1. Does the taxation invoked by the Respondents constitute an interference with the sovereignty of the Mescalero Apache Tribe?

2. Does this taxation by Respondents frustrate a clear federal policy and program of encouraging Indian tribes to pursue programs designed to produce economic development on their reservations.

I

ARGUMENT

Taxation By The State Of New Mexico Of The Personal Property Of An Indian Tribe Or The Imposition Of A Privilege Tax Upon An Indian Tribal Enterprise Definitely Frustrates A Clear Federal Policy To Produce Economic Development Upon Indian Reservations.

President Nixon in a Message to Congress on July 8, 1970, said:

> "The destiny of Indians and Indian communities throughout the United States is dependent upon their ability to utilize productively their remaining lands and natural resources. The federal government has acknowledged its trust responsibility to Indians, which arises out of a history of unfortunate relations between the nation and its original inhabitants. In pursuance and fulfillment of this responsibility, the government has afforded certain advantages to its Indian wards. Special treatment and programs for Indians are nec-

essary to compensate for unconscionable dealings with the Indians in the past and to remedy the most alarming present state of abysmal poverty and despair that typifies Indian communities."

A year later, on December 11, 1971, the Senate passed Senate Concurrent Resolution 26. This statement of national Indian policy specifically replaces the termination policy embodied in House Concurrent Resolution 108, 83rd Congress (August 1, 1953). It proclaims

> That it is the sense of Congress that . . . . . improving the quality and quantity of social and economic development efforts for Indian people and *maximizing opportunities for Indian control and self-determination* shall be a major goal of our national Indian policy. (emphasis added)

It is the primary purpose of the Bureau of Indian Affairs to implement a federal policy of changing this situation. Every year, as part of its proposed budget for the coming fiscal year, the Bureau of Indian Affairs makes the following statement to the House and Senate Appropriation Subcommittees considering its budget request:

> "The ultimate goals of the Bureau of Indian Affairs for the Indian people are maximum economic self-sufficiency, equal participation in American life and equal citizenship privileges and responsibilities. The Bureau is working toward

the attainment of these goals through two basic programs, one of which is education, and the other is the economic development of reservation resources."

The United States recognized that the reservation system has imposed severe limitations on the ability of Indians to maintain a livelihood. Limitation of land area changed traditional patterns of living; confinement to lands which were unfertile and short of water made it difficult to eke out even a subsistence standard of living; and removal to new, often strange areas was destructive of family and community which is the basis of cultural identity and social structure.

With a gradual decline in direct subsidies and a realization that paternalism would only foster continued dependence, there has emerged a Federal policy of encouraging economic development and self-sufficiency. The future of those programs is in grave doubt if Indians lose by judicial fiat the slim but important margin of advantage Congress has afforded them through exemption of their land and its income from taxation. As this Court emphasized in *Choate v. Trapp*, 224 U.S. 665 (1912) the Indians' tax exemption is a valuable and vested property right.

The case at bar, however, presents a serious new question for the Court's decision. This Court's decision will definitely determine the success or failure of a Federal policy designed to produce economic development and self-sufficiency for Indians and Indian enterprises. The purpose of this Federal policy is

clearly profitability of the Indian enterprise, and the measure of the Federal policy's success is the degree of economic improvement in the Indians' economic position. The taxes imposed by the State of New Mexico directly interfere with this Federal policy and goal, and a matter of such grave importance should therefore command the attention and assistance of this Court. *Williams v. Lee* 358 U.S. 217 (1959).

II

Taxation By The State Of New Mexico Upon Personal Property Owned By An Indian Tribe Constitutes An Illegal Interference With Tribal Sovereignty.

From the earliest years of the Republic Indian tribes have been recognized as "distinct, independent, political communities." *Worcester v. Georgia*, 6 Pet. 515, 559 (1832), and, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty. Thus, treaties and statutes of Congress have been looked to by the courts as limitations upon original tribal powers, or, at most, evidences of recognition of such powers rather than as the direct source of tribal powers. This is but an application of the general principal that "It is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror." *Wall v. Williamson*, 8 Alabama 48, 51. In fact, in 1959 the United States Supreme Court made it clear that the

law had not changed on this subject when it stated "over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained." *Williams v. Lee*, 358 U.S. 217, 219. The test of whether a State statute may be enforced upon an Indian reservation is "whether the application of that law would interfere with reservation self-government". Organized *Village of Kake v. Egan*, 369 U.S. 60, 67-8, 75 (1962).

Perhaps the most basic principle of all Indian law, supported by a host of decisions, is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express Acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian Tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. Statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty, and therefore properly falls within the sta-

tutory category, "powers vested in any Indian Tribal Council by existing law".

The Acts of Congress which appear to limit the powers of Indian tribes are not to be unduly extended by doubtful inference. What was said in the case of in re *Mayfield*, 141 U.S. 107 is still pertinent:

> "The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization. We are bound to recognize and respect such policy and to construe the acts of the legislative authority in consonance therewith."

In point of form, it is immaterial whether the powers of an Indian tribe are expressed and exercised through customs handed down by word of mouth or through written constitutions and statutes. In either case the laws of the Indian tribe owe their force to the will of the members of the tribe. The status of Indian nations or tribes, preserving their political entity under the decisions of the Supreme Court, has been summed up in Felix F. Cohen's "Handbook of Federal Indian Law," at page 122, as follows:

> "The whole course of judicial decision and the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses in the first instance, all

the powers of any sovereign state. (2) Conquest renders the tribe subject to legislative powers of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e. g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i. e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government."

In *United States v. Kagama*, 118 U.S. 375, 6 Supreme Court 1109, 1112, the Court sums up the status of the Indian in the following language:

> "They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relation; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, thus far not brought under the laws of the Union or of the State within the limits they reside."

The acknowledgment of tribal sovereignty or autonomy by the courts of the United States has not been a matter of lip service to a venerable but outmoded theory. The doctrine has been followed through the most recent cases, and from time to time car-

ried to new implications. Moreover, it has been administered by the courts in a spirit of genuine respect. In fact, the painstaking analysis by the Supreme Court of tribal laws and constitutional provisions in the Cherokee intermarriage cases, (203 U.S. 706) is typical, and exhibits a degree of respect proper to the laws of a sovereign state.

The whole course of congressional legislation with respect to the Indians has been based upon a recognition of tribal autonomy. As was said in a Report of the Senate Judiciary Committee (prior to the enactment of the United States Code, Title 18, Sec. 548); "Their right of self-government, and to administer justice among themselves, after their rude fashion, even to inflicting the death penalty, has never been questioned." (Sen. Report No. 268, 41st Congress, 3rd Session). In fact, the courts have consistently seen fit to view the status of Indian tribes and the sovereignty possessed by them as being above the sovereignty accorded states. For instance, in the case of *Native American Church v. Navajo Tribal Council*, 272 F. 2d 131 (1959), the Court said:

> "But as declared in the decisions hereinbefore discussed, Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States."

From the foregoing it is apparent that the Mescalero Apache Tribe possesses that all important attribute of sovereignty known as the power to tax. It must be conceded that this is an essenial, if self-government by an Indian tribe is to be meaningful and compatible with the recognition evidenced by the many decisions by the United States Supreme Court dealing with the subject. The tribe can only be deprived of this right by an Act of Congress. Hence, any taxation by the State of New Mexico of personal property owned by an Indian tribe or the imposition of a privilege tax upon an Indian tribal enterprise clearly constitutes an interference with tribal sovereignty, and such taxation therefore should not be allowed.

CONCLUSION

The attempted taxation of an Indian tribe by the State of New Mexico should be struck down because of its adverse effect upon Indian tribes seeking economic development and self-sufficiency. Imposition of a personal property tax or a privilege tax by the State of New Mexico upon the wholly owned economic enterprise of the Mescalero Apache Tribe clearly frustrates a Federal policy designed to encourage economic development of reservation resources.

Hence, for the reasons set forth in this Brief, the Agua Caliente Band of Mission Indians urge this Honorable Court to render a decision in favor of the Mescalero Apache Tribe.

Respectfully submitted,

AGUA CALIENTE BAND
OF MISSION INDIANS

Raymond C. Simpson

By RAYMOND C. SIMPSON
Tribal Attorney